

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA

v.

IRVIN DUKES,

Defendant.

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1:19-CR-059-RP

ORDER

Before the Court is Defendant Irvin Dukes's ("Dukes") motion to suppress the evidence obtained in the search of Dukes's home and cellphone. (Dkt. 20). The Government filed a response. (Dkt. 25). The Court held a hearing on the motion on September 9, 2019. (Hr'g Tr., Dkt. 26). Having reviewed the parties' submissions, the record, and the applicable law, the Court will deny the motion.

I. BACKGROUND

Dukes is charged in a one-count indictment with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (Indictment, Dkt. 1). After serving a fifteen-year sentence in federal prison, Dukes began a five-year term of supervised release on December 14, 2019. (Mot. Suppress, Dkt. 20, at 2). When Dukes moved to Austin, Austin probation officer Linda Cano began courtesy supervision of his case. (*Id.*).

On January 14, Officer Cano conducted a home visit and noted that Dukes had new furniture in the home and appeared to be living beyond his means. (Resp., Dkt. 25, at 1). Two weeks later, on January 28, 2019, Dukes submitted a urine specimen that tested positive for

methamphetamine. (Resp., Dkt. 25, at 1).¹ During a conversation with Officer Cano, Dukes admitted to using methamphetamine a few days before the urine test. (Resp., Dkt. 25-2, at 2).

During a home visit on February 1, 2019, Dukes admitted to associating with a known narcotics user by the name of Kentucky. (Reasonable Suspicion Memo, Dkt. 20-1, at 2). At this time, Officer Cano indicated to Dukes that she intended to seek the following modification of the conditions of Dukes's supervised release to include the following search condition:

The defendant shall submit his or her person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. **The probation officer may conduct a search under this condition only when reasonable suspicion exists that the defendant has violated a condition of supervision and that the areas to be searched contain evidence of this violation.** Any search shall be conducted at a reasonable time and in a reasonable manner.

(Mot. Suppress, Dkt. 20, at 2–3). Officer Cano explained that a probation officer's authority to search would be based on a reasonable suspicion standard rather than a probable cause standard. (Hr'g Tr., Dkt. 26). She further warned Dukes that if she suspected he or his wife were using narcotics, she would notify both Child Protective Services ("CPS") and the court. (Request for Modifying the Conditions of Dukes's Supervised Release, Dkt. 25-2, at 2). Dukes agreed to the modification, noted that he hoped the imposition of the condition would help him and his wife avoid using drugs, and waived his right to a hearing. (*Id.* at 2–3). A week later, United States District Judge Orlando Garcia granted the requested modification. (*Id.* at 1).

¹ The test results pertaining to the January 28, 2019 urine specimen are described differently in the documentation submitted by the probation department. The Form 12B Request to Modify states that the urine sample tested positive for methamphetamine. The Reasonable Suspicion Memo prepared by Officer Cano on June 13, 2019, states that the urine specimen tested positive for methamphetamine and the specimen was diluted. (Resp., Dkt. 25-2, at 1; Mot. Suppress, Dkt. 20-1, at 2).

On February 12, 2019, Officer Cano and fellow U.S. Probation Officer Hector Garcia made an unannounced visit to Dukes's residence and found a man named Kentucky hiding in the closet. (Reasonable Suspicion Memo, Dkt. 20-1, at 2). Noting his dilated pupils and erratic behavior, Officer Cano testified that Kentucky appeared to be under the influence of drugs. (Hr'g Tr., Dkt. 26). Officer Cano again instructed Dukes to submit to a urine sample, which was returned diluted.²

On March 4, 2019, Officer Cano led a search team to Dukes's residence. (Mot. Suppress, Dkt. 20., at 3). Officers from the Austin Police Department accompanied the search team. (*Id.* at 4). When the search team arrived, Dukes and a man named Mikhaul Weiss were present at the residence. (*Id.*). Officers placed Dukes in handcuffs and transported him to a squad car. (Hr'g Tr., Dkt. 26). Weiss then admitted—and Officer Cano confirmed—that Weiss was on probation for aggravated robbery. (*Id.* at 4). During the search, officers found one handgun under a pillow in the master bedroom and a revolver in a woman's purse. (Mot. Suppress, Dkt. 20, at 4). After Dukes's phone was seized and turned over for download, probation officers also found a photograph of a third firearm on Dukes's phone. (*Id.* at 4). Dukes was taken in on a revocation warrant and the government indicted him on a felon in possession of a firearm charge. (*Id.* at 4).

Dukes now asks the Court to suppress the evidence gathered during the search because he contends the search violated the Fourth Amendment. (Mot. Suppress, Dkt. 20, at 1). Dukes argues that the search of his home was unconstitutional for three reasons. First, Dukes argues that his consent to the search condition was not obtained voluntarily and thus violated his due process rights. (*Id.* at 7–10). Second, Dukes argues that the search of his home was not supported by reasonable suspicion. (*Id.* at 10–13). Third, Dukes contends that even if the search was supported by

² At the Motion to Suppress Hearing on September 9, 2019, Officer Cano explained that the lab only issues a report on a urine analysis if the Probation Officer requests one. There is no lab report to indicate whether the urine sample came back positive because Officer Cano did not request a lab report.

reasonable suspicion, the search exceeded the scope allowed under the search condition. (*Id.* at 13).

The Court considers each of these arguments in turn.

II. DISCUSSION

A. Voluntariness and the Search Condition

First, Dukes contends that he did not voluntarily consent to a modification of the conditions of his supervised release. (Mot. Suppress, Dkt. 20, at 8). Specifically, Dukes argues that he signed the search condition immediately after Officer Cano told him that she would call CPS if she suspected he had resumed using drugs. (*Id.*). Dukes argues that his consent to the search condition was “extracted in response to an explicit statement that he ran the risk of losing his child if he did not agree” and was therefore not obtained voluntarily. (*Id.*).

Before a court can modify the conditions of probation or supervised release, the court “must hold a hearing, at which the person has the right to counsel and an opportunity to make a statement and present any information in mitigation.” Fed. R. Crim. P. 32.1(c)(1). If the person waives the hearing, the hearing is not required. Fed. R. Crim. P. 32.1(c)(2)(A). A waiver of the rights protected by Rule 32.1 must be knowing and voluntary. *United States v. Hodges*, 460 F.3d 646, 653 (5th Cir. 2006).

There is no evidence to suggest that Dukes’s consent to the modification of his supervised release was anything but knowing and voluntary. As Officer Cano testified at the motion to suppress hearing, she properly explained the search condition and that probation officers would have the authority to search based on a reasonable suspicion standard rather than the normal probable cause standard. (Hr’g Tr., Dkt. 26). Before Dukes signed the modification, he indicated his hope that the imposition of the search condition would help him to avoid drugs. (Request for Modifying the Conditions of Dukes’s Supervised Release, Dkt. 25-2, at 2). Moreover, no facts indicate Officer Cano threatened to have Dukes’s child taken away *if he did not sign the search condition*, as Dukes now

alleges. (Mot. Suppress, Dkt. 20, at 8). Rather, the evidence shows Officer Cano warned Dukes that she would call Child Protective Services *if she suspected he or his wife had reverted to abusing narcotics*. (Request for Modifying the Conditions of Dukes's Supervised Release, Dkt. 25-2, at 2). Therefore, the Court is satisfied that Officer Cano properly obtained Dukes's consent to the search condition.

B. Reasonable Suspicion

Second, Dukes argues the search was unconstitutional because it was not supported by reasonable suspicion. (Mot. Suppress, Dkt. 20, at 10). Specifically, Dukes argues that his positive urine analysis on January 28, 2019 was insufficient to demonstrate that reasonable suspicion existed on March 4, 2019, the day the search was conducted. (*Id.* at 11). Dukes insists that reasonable suspicion must exist at the time of the search, and other than the positive urine analysis in January, “Dukes did not engage in any new behavior that constituted a suspected violation of his supervised release.” *Id.* at 12.

The Fourth Amendment protects “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. “The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined ‘by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.’” *United States v. Knights*, 534 U.S. 112, 118–19 (2001) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). The Supreme Court has determined that a defendant’s status as a probationer “informs both sides of that balance.” *Id.* at 119. Because probationers have committed crimes, they enjoy fewer privacy rights than law-abiding citizens. *Id.* For its part, the government has a strong interest in protecting the public and ensuring the rehabilitation of past offenders. *Id.* The balance of these two interests requires “no more than reasonable suspicion” to conduct a search of a

probationer's home. *Id.* at 121. Therefore, a warrantless search of a probationer's home does not violate the Fourth Amendment so long as the search is supported by reasonable suspicion. *Id.*

Reasonable suspicion requires "some minimal level of objective justification that consists of more than inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *United States v. Smith*, 273 F.3d 629, 633–34 (5th Cir. 2001). Reasonable suspicion must be based upon "specific facts which, taken together with rational inferences therefrom, reasonably warrant an intrusion." *Id.* at 634. In determining whether reasonable suspicion existed at the time of the search, courts must consider the totality of the circumstances. *Id.* In the context of probation, the Supreme Court has insisted that the probation agency "must be able to proceed on the basis of its entire experience with the probationer, and to assess probabilities in the light of its knowledge of his life, character, and circumstances." *Griffin v. Wisconsin*, 483 U.S. 868, 879 (1987).

The Court is satisfied that Officer Cano had reasonable suspicion to conduct a search. Officer Cano's suspicion that Dukes was using drugs and thereby violating a condition of his supervised release rested on specific and articulable facts, which, viewed in the light of her entire experience with Dukes, reasonably caused her to suspect Dukes was involved in illegal drug activity. During a home visit, Officer Cano observed new living room furniture, which Officer Cano determined, based on her knowledge of Dukes's life and circumstances, to indicate Dukes may be living beyond his means. (Resp., Dkt. 25, at 1). Over the course of two months, Dukes submitted two problematic urine samples, admitted to using methamphetamine, and associated with a known narcotics user named Kentucky. (Reasonable Suspicion Memo, Dkt. 20-1, at 2). During another home visit, Officer Cano found Kentucky hiding in Dukes's closet and noted that Kentucky was under the influence of drugs. (Hr'g Tr., Dkt. 26). These observations are more than sufficient to constitute reasonable suspicion.

Dukes cites to staleness concerns and insists that since the search occurred over a month after Dukes's positive urine analysis, Officer Cano did not have reasonable suspicion on the day of the search. (Mot. Suppress, Dkt. 20, at 11–12). In addressing the issue of staleness in the warrant context, the Fifth Circuit has noted that information in an affidavit need not be regarded as stale, even if fairly long periods of time have lapsed between the information and the issuance of the warrant, if the affidavit shows a long-standing, ongoing pattern of criminal activity. *United States v. Craig*, 861 F.2d 818, 822–23 (5th Cir. 1988). Here, Officer Cano's observations in the two months leading up to the search gave her reason to suspect ongoing personal drug use. Dukes's urine sample tested positive for methamphetamine on January 28, 2019. (Request for Modifying the Conditions of Dukes's Supervised Release, Dkt. 25-2, at 2). In the weeks that followed, Officer Cano learned of Dukes's association with a known narcotics user, found that narcotics user hiding in Dukes's closet, and obtained a second, diluted urine sample from Dukes. (Reasonable Suspicion Memo, Dkt. 20-1, at 2–3). These facts only heightened Officer Cano's suspicion that Dukes's use of methamphetamine in January was not an isolated relapse, but an ongoing problem. (Hr'g Tr., Dkt. 26). Because Officer Cano's reasonable suspicion rested on facts indicating ongoing drug activity, the search was not supported by stale information.

C. Scope of the Search

Dukes further argues that the search exceeded the scope permitted under the search condition. (Mot. Suppress, Dkt. 20, at 13). The search condition limited the scope of a search to areas that could contain evidence of a supervised release violation. (*Id.* at 3). Officer Cano had reasonable suspicion that Dukes had reverted to illegal drug use. It is reasonable that evidence of drug use could be found under Dukes's bed, under his pillows, and in his wife's purse. Likewise, it was reasonable to suspect evidence pertaining to Dukes's relapse could be found on his cell phone, in the form of text messages or photographs. Moreover, the search condition itself warned Dukes

that probation officers could search his “electronic communications or data storage devices or media” if they had reason to suspect he had violated a condition of his supervised release and the device contained evidence of this violation. (Mot. Suppress, Dkt. 20, at 3). Therefore, the search did not exceed the scope permitted under the search condition.

Because this Court finds Dukes voluntarily consented to the search condition, the search was properly supported by reasonable suspicion, and the scope of the search was permissible, the Court will deny Dukes’s motion to suppress evidence gathered during the search.

IV. CONCLUSION

Accordingly, Dukes’s motion to suppress, (Dkt. 20), is **DENIED**.

SIGNED on September 18, 2019.

A handwritten signature in blue ink, appearing to read "Robert Pitman", written over a horizontal line.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE